Bargaining Unit Policies for Construction and Construction Related Employment

[1997] Alta.L.R.B.R. DP-001
April 10, 1990

Objective:

The Labour Relations Board is examining its policies about construction and construction related bargaining units. Our goal is to establish policies about appropriate bargaining units and publish them in a revised Information Bulletin #11.

This "Report for Discussion" gives the Board's preliminary ideas, designed to encourage industry reaction. The Board would like to hear from any interested party on any of the issues raised in this report. The Board will consider submissions before adopting firm policies.

Defining the Scope of this Review:

This discussion paper deals with bargaining units appropriate for employees in the construction industry, as defined in the Labour Relations Code. It also deals with units appropriate for tradespersons when employed other than in the construction industry. This includes persons employed in service, maintenance, plants, shops and similar forms of employment.

In this report for discussion, we will use the terms **construction** and **non-construction** work. What we mean by these terms is:

> ***Construction:*** *By this we mean work that falls within the definition of construction contained in section 1(g) of the Labour Relations Code. This is work to which the Code's registration system may apply. Sometimes we refer to this as the "true construction industry".*

> ***Non-construction:*** *By this we mean work done by tradespersons except when they are doing construction work as defined by the Labour Code. This non-construction work includes tradespersons working in maintenance, service and repair. It includes work done in plants, manufacturing enterprises and similar types of employment. Sometimes we refer to this as "quasi-construction" to distinguish this type of work from true construction.*

We will also use the terms **bargaining unit**, **unit description** and **certificate**. What we mean by these terms is:

> ***Certificate:*** *A certificate granted under the Labour Relations Code gives the named trade union the right to act as exclusive bargaining agent on behalf of a group of employees of the employer. The certificate sets out the name of the union, the name of the employer and the bargaining unit to which the bargaining rights relate.*

> ***Bargaining Unit and Unit Description:*** *A bargaining unit is a group of employees of an employer. The unit description is the words the Board uses to describe which of the employees fall within the bargaining unit.*

As a certificate will have only one unit description and apply to only one bargaining unit, the certificate and the unit are sometimes referred to interchangeably.

Why a review?

Several factors make this review timely. The Construction Industry has recently embarked on bargaining under a new Province-wide bargaining structure. This follows a long period with few construction agreements.

In 1982, the Board introduced Information Bulletin 18-82. This bulletin tried to set out unit description policies for plants and for the service, maintenance and repair area of employment. It did not deal with employment in true construction, which was covered by the Act's registration provisions. Early in 1985, the Board revoked bulletin 18-82 because some of its policies proved unworkable. Since then, the Board has proceeded on a case-by-case basis. Changing times have made it hard to establish alternate policies.

The Labour Relations Code requires replacement certificates for those issued under the Act. The Code gives the Board the ability to standardize units to fit its present bargaining unit policies. This task alone requires a review of what these policies ought to be.

The Appropriate Bargaining Unit Question:

This paper is about appropriate bargaining units. We must keep our attention focused on the statutory provisions that govern this question. The Board does not have unlimited discretion in establishing unit descriptions. The Board must exercise its discretion within the words and spirit of the Code.

The Code defines a unit as "any group of employees of an employer" (Section 1(y)). Section 11 (3)(l) gives the Board the discretion to decide whether "a group of employees is a unit appropriate for collective bargaining".

A trade union's certification application must be for a unit it thinks is appropriate for collective bargaining. It must get the necessary 40% support within that unit. The Board, before granting a certification vote, must examine the proposed unit for appropriateness.

If the certification process is like an election, the bargaining unit is like the constituency boundaries. The Board must establish these boundaries. It must decide whether "the unit applied for, or a unit reasonably similar thereto, is an appropriate unit for collective bargaining" (Section 32(1)(c)).

The Board's job is not to decide whether the unit applied for is the best possible unit, only whether it is appropriate.

The Code automatically excludes from a unit people employed as managers or in confidential labour relations jobs. It also excludes certain professional people. The Board does not need to exclude these persons when defining a bargaining unit. The Code excludes them automatically.

The Code links appropriateness specifically to the collective bargaining process. The Board must decide whether the unit will be suitable for the collective bargaining that will follow certification, if the employees choose representation.

For construction bargaining, the legislation gives the option of registration. Most employers in

the construction industry have taken up this option. As a result, most construction bargaining follows the pattern set out in the Code's registration provisions. This fact has a strong impact on the Board's views on appropriate construction units. The Board believes it should not certify bargaining units where, because of registration, the unit cannot be bargained for in its entirety.

Outline:

We have divided this paper into five parts:

1. **Construction vs. Non-Construction Work**
2. **Bargaining Units within Construction**
    a. **Should the Board continue to certify construction employees on a trade-by-trade basis?**
    b. **Should we base bargaining units on the separate sectors within construction, or should they span the various sectors?**
    c. **How should we word and describe appropriate units?**
    d. **Is the present list of trade based bargaining units satisfactory or are changes needed?**
    e. **Should we base our units on job functions or job qualifications?**
3. **Non-construction Bargaining Units**
    a. **Plants**
    b. **Maintenance Contractors**
    c. **Labour Brokers**
    d. **Construction Fabricating Shops**
    e. **Commercial Fabricating Shops, Service, Repair and Specialty Trade Contractors**
4. **Scope of Certificates and Trade Union Constitutional Capacity**
    a. **Territorial Scope - Construction Certificates**
    b. **Territorial Scope - Non-Construction Certificates**
    c. **Joint Applications - Two or more Trade Jurisdictions**
    d. **Joint Applications - Territorial Scope**
    e. **Trade Union Constitutional Capacity**
5. **Replacement Certificate Issues**
    a. **Unit descriptions based on extended craft jurisdictional claims**
    b. **Unit descriptions that include construction and non-construction work for a particular craft**
    c. **Unit descriptions referring to field work or field employees**
    d. **Unit descriptions limited to one sector**
    e. **Trades that only operate in one sector**
    f. **Trades that operate in two or more sectors**
    g. **Certificates that cover two or more trade jurisdictions**
    h. **Certificates that cover all construction employees**
    i. **Certificates that cover less than a current trade jurisdiction**
    j. **Shop Certificates**
    k. **Maintenance Certificates**
    l. **Managerial Exclusions**

1. Construction vs. Non-Construction Work

Should the Board continue its policy of not mixing construction and non-construction employees

in the same certificate? The Board has kept them strictly apart for almost 20 years. However, some certificates and the unit descriptions they contain pre-date that policy and cover construction and non-construction employees within a particular craft.

For the last three years, Alberta's labour legislation has defined construction. The Code now reads:

> *1(g) "construction" includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include*
>
> > *(i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or*
> >
> > *(ii) maintenance work;*

Part 3 of the Labour Relations Code sets up special provisions for construction bargaining. These registration provisions, and the bargaining regime that follows from registration, are unique to the construction industry. The Code separates construction and non-construction bargaining even more completely than did the Act.

Through the Construction Industry Transition Regulation, most of the industry has opted for registration bargaining. Therefore, for most construction employees, a bargaining unit appropriate for collective bargaining must be one that fits the registration bargaining system.

The Board has firmly adhered to its policy of separate bargaining units for construction and non-construction work for about 20 years. The Board has had no major difficulties with its application and it has not been the subject of any strong industry criticism. This experience is persuasive evidence that the policy ought to continue in generally the same form.

There have been disputes, particularly during certification applications, about whether employees fall within construction or not. Arguably, a policy that combined construction and non-construction work might avoid such disputes. Arguably also, the Board officer's tasks would be easier. However, the Board suspects alternate arguments would soon fill the void. Such disputes are inevitable so long as certification depends on whether the applicant union has a certain percentage of support.

Before 1970 (and therefore before registration), the Board granted unit descriptions covering tradespersons whether in construction or not. Some of those old certificates, for example "all carpenters", still exist. These unit descriptions will not fit this policy. They will need accommodation during the replacement certificate process. However, no policy will avoid the need to accommodate anomalies. The Board believes this can be done with relative ease (See Part 5, below).

> ***Proposal: The Board should continue its policy of certifying construction employees separately from non-construction employees.***

Given this preliminary conclusion, the next two parts of this report will deal with construction units and non-construction units separately. Again, by this we mean the construction industry as defined by the statute and then the other types of work done by construction tradespersons.

2. Bargaining Units within Construction

Here, we will deal with policy questions related directly to construction bargaining units. We will deal with some related questions concerning territorial limits and union constitutional provisions in Part 5. The questions we will address here are:

a. Should the Board continue to certify construction employees on a trade by trade basis?
b. Should we base bargaining units on the sectors within construction, or should they span the various sectors?
c. How should we word and describe appropriate units?
d. Are the present trade-based units satisfactory, or do some need changes?
e. Should we base construction units on job function or trade qualifications?

a) Should the Board continue to certify construction employees on a trade by trade basis?

Most construction employees who choose trade union representation choose the building trade union appropriate to their craft. There has been little organizing by industrial unions in this area. Unionized construction employees maintain strong allegiance to their craft unions. Partly this is due to the hiring halls, the health, welfare and pension benefits and social facilities these unions offer.

The training construction employees receive parallels the jurisdictional lines followed by the craft unions. This reinforces trade based allegiances and creates a strong community of interest amongst employees in the various crafts.

Registration bargaining under the Labour Relations Code also follows craft lines. Considering these facts, the Board sees no reason to depart from its long established policy of certifying construction employees on craft lines.

> ***Proposal: The Board should continue to certify construction employees on a trade by trade basis.***

b) Should we base bargaining units on the separate sectors within construction, or should they span the various sectors?

The regulations divide the construction industry into four sectors: General Construction, Pipeline, Roadbuilding and Heavy Construction, and Specialty. The Lieutenant-Governor in Council establishes these sectors.

The Board's policy in the past has been:

> All standard construction bargaining units cover all employees of an employer employed in construction in a particular trade. These certificates encompass employees in all four sectors set out in the regulation. The Board does not grant construction certificates limited to a particular sector.

Should this policy change? The Board's general approach to construction units is that they should reflect the registration scheme adopted by the industry. This suggests bargaining units based on the separate sectors.

Many trades, by the nature of their work, only operate in one sector. Others operate in two or more. Operating Engineers, Teamsters and Labourers operate in General, Pipeline and Roadbuilding. Plumbers and Pipefitters operate in Pipeline and General.

For trades that operate in one sector the question of sectorization is academic. For those that work in more than one, there are factors that weigh for and against sectorization.

A unit ***appropriate for bargaining*** suggests a sector-based split. This is because bargaining under registration must be sector-based.

Even for trades operating in two or more sectors, most of the employers only operate in one of those sectors. For them the issue is not often important. However, under the Board's present

policy, if a roadbuilding contractor's employees chose certification, the certificate would cover all sectors. If that contractor later decided to diversify into pipeline work, the certificate would bind that contractor to the registration agreement for that trade in the pipeline sector. A certificate limited to the roadbuilding sector would not have this effect.

Certificates should grant bargaining rights for the type of employees employed at the time of the certification application. It is difficult to justify granting bargaining rights for employees in all sectors as a result of the wishes of employees employed in only one of those sectors. This is particularly so as employees often work primarily within one sector. For example, pipeliners rarely go to work in general construction. However, for Operating Engineers it is not uncommon for employees to work in two sectors.

In its favour, the Board's previous policy of cross-sector certificates has not caused much difficulty. One exception relates to the Plumbers and Pipefitters trade in pipeline work. We deal with this issue below in relation to the specific trades.

Most current certificates are not sector specific, although some are. Switching to a sector specific system will require accommodations when issuing replacement certificates. We discuss this issue in Part 5, below.

The Board wishes to hear from affected parties about the impact sector-based bargaining units might have on their operations.

Proposals: In future, construction bargaining units should be sector specific.

c) How should we word and describe appropriate units?

During the 1950's and 60's, the Board granted certificates modeled primarily on the various trade unions' claims to jurisdiction. In the 70's and 80's, the Board has used simpler unit descriptions which refer to the trade name. An example of this newer type of certificate reads:

All employees when employed in construction as boilermakers, boilermaker apprentices, boilermaker foremen and boilermaker welders.

These simplified descriptions presume parties are familiar with the dividing line between trades, and can assign employees without reference to complex claims of jurisdiction. Largely this has worked well.

During certification applications, issues will arise about the trade designation of particular employees. However, this is inevitable no matter how complex and comprehensive the unit description.

The Board's view is that it is sensible to continue the use of these abridged descriptions. We believe we can abridge the unit descriptions even further by setting out a few simple presumptions in the Information Bulletin. For example, do we need a reference to apprentices, welders and foremen in each unit description? We could accomplish this by a brief sentence in the Bulletin saying:

Each construction unit description includes the foremen, apprentices and welders related to that trade.

We already use a similar presumption about the union's territorial jurisdiction (see Part 4 below).

We say foreman are included in a unit. More precisely, we mean non-managerial people employed in foreman-like positions. Managerial people are not employees and are excluded automatically. There are a variety of terms for foreman-like persons including lead hands, supervisors, general foreman, etc. The rule is, if they are non-managerial they are included in

their trade unit, no matter what particular title they hold.

The trade jurisdictions we set out presume that each is exclusive of the other. A person is working in one bargaining unit or another, not in both. The same is true in respect of the four sectors. Therefore, each bargaining unit description takes some of its meaning from the other trade jurisdictions in existence.

If disputes arise, the Board has authority to make a ruling. In doing so the Board applies its experience to the actual work functions performed by the employee in question. The Board may consider prevailing industry practice, which may include the jurisdictional rules between trades. However such rules do not bind the Board. Local practice and other considerations may prove important in making any necessary jurisdictional rulings for the Board's purposes.

> ***Proposal: The Board should adopt simply worded trade and sector-based unit descriptions for certificates, and provide explanatory notes to those unit descriptions in the appropriate Information Bulletin.***

d) Is the present list of trade-based bargaining units satisfactory or are changes needed?

We have already expressed the view that appropriate construction bargaining units are units that will fit naturally into the registration bargaining system. We also propose sector-based certificates for some trades.

The unit descriptions set out in the present Information Bulletin 11 generally achieve these policies. However, there have been some changes in trade union organization, apprenticeship categories or scope of registrations that justify a second look.

We would see the following current unit descriptions, with modified wording, as continuing to be appropriate for the general construction sector.

General Construction Boilermakers
General Construction Camp Caterers
General Construction Carpenters
General Construction Cement Masons
General Construction Electricians
General Construction Floor Coverers
General Construction Elevator Constructors
General Construction Glassworkers
General Construction Insulators
General Construction Labourers
General Construction Millwrights
General Construction Operating Engineers
General Construction Painters
General Construction Plasterers
General Construction Plumbers and Pipefitters
General Construction Refrigeration Mechanics
General Construction Roofers
General Construction Sheet Metal Workers
General Construction Sprinkler Fitters
General Construction Teamsters
General Construction Tilesetters

In addition, we see the following units as appropriate for General Construction:

General Construction Reinforcing Ironworkers
General Construction Structural Ironworkers

In the past, the Board has used one Ironworkers unit description. However, industry has divided

Ironworkers into two classifications for many years. The Industry has negotiated two collective agreements, and operated under two registration certificates. The Board believes it appropriate that the unit descriptions follow the registrations.

General Construction Lathers and Interior Systems Mechanics

In the past, the Board has certified these trades separately. However, the apprenticeship program is now merged, as is registration bargaining. Employees from either trade are frequently doing the same type of work. The Board believes one unit description would be appropriate.

General Construction Masonry Bricklayers
General Construction Refractory Bricklayers

For many years, the Refractory Employers have bargained separately from the remainder of the Bricklayer's trade, usually called Masonry work. The contractors persuaded the Board that it was appropriate to grant two separate registrations. There is little or no overlap between the one group of employers and the other. As a result, the Board believes separate unit descriptions are appropriate.

General Construction Sheeters, Cladders and Deckers

The Board's information bulletin does not list sheeters, cladders and deckers as a separate trade. However, the Board has certified sheeters, cladders and deckers bargaining units several times. A separate registration and collective agreement cover the trade. The industry treats this work as separate from the related trades of sheet metal worker, roofer and labourer. However, the Board wishes to hear from parties involved in the roofing industry and related work about any overlap between these trades.

For the pipeline sector, the Board would see the following unit descriptions as appropriate:

Pipeline Construction Labourers
Pipeline Construction Operating Engineers
Pipeline Construction Teamsters

Pipeline employees usually represented by the Plumbers and Pipefitters Union do different work to that done by that Union's members in the general construction sector. The terms plumber and pipefitter are inept to describe this different type of work that, nonetheless, falls within the U.A.'s jurisdiction. This includes the work of stabbers, spacers, clampers etc. It would also include welders. We proposed earlier that related welders be deemed to fall within each craft certificate. We believe it sensible to set up a separate unit for these employees. However, an appropriate descriptive word is hard to find. We therefore propose:

Pipeline Construction Stabbers, Spacers and Clampers

For roadbuilding and heavy construction:

Roadbuilding and Heavy Construction Labourers
Roadbuilding and Heavy Construction Teamsters
Roadbuilding and Heavy Construction Operating Engineers

For speciality construction:

Specialty Construction Crane Rental Employees
Specialty Construction Non-Destructive Testing Employees

e) Should we base our units on job functions or job qualifications?

The Alberta Labour Relations Board has based its bargaining unit policies on the functions actually performed by the employees in question, not their trade qualifications. Periodically, parties ask the Board to vary this policy but, to date, it has not done so. Normally this request comes in the form of an application for certification for a unit of "qualified tradespersons" or "journeymen and indentured apprentice tradespersons".

Other Boards with similar legislation grant such certificates, Alberta does not. Should we reconsider this policy? We set out some of the factors and a tentative proposal below. However, we are anxious to hear the experience and views of affected parties on this issue.

Some parties argue the Manpower Development Act, particularly for proficiency trades, prohibits non-certified employees working at the various trades. For example, electricians must be journeymen or apprentices. Uncertified or unregistered persons functioning on a job as electricians are illegal under Alberta law. The Board should not, therefore, countenance their inclusion as employees for the purposes of collective bargaining. The arguments for "qualified persons" certificates is stronger for proficiency trades than for the qualification trades.

Others argue that it is the job of the Manpower Development Act authorities, not the Board, to police the qualifications of tradespersons working in Alberta. The Board's job is to decide whether units are appropriate for collective bargaining. There are clearly some cases where non-qualified persons do work contrary to the Manpower Development Act. Those persons are still employees. If they are not in the craft unit related to that work, where do they fall? Should the Board exclude them from collective bargaining entirely?

If we exclude these people from collective bargaining, how are their rates determined? Would excluding unqualified employees from the collective agreement encourage, rather than discourage, such employment?

Some argue that a functional rather than a qualification approach penalizes trade unions. The argument is that unions are unable to take into membership persons without proper trade qualifications. The argument goes further. Some say employers deliberately hire non-qualified persons because they know that they are not, and cannot be, trade union members. The argument concerning trade union constitutional restrictions applies only to some craft unions, not to all.

The Board has seen some cases of deliberate hiring of non-qualified persons, motivated, in the Board's view, by a desire to avoid unionization. However, these cases are rare. The Board doubts they are common enough to justify a departure from the functional approach in favour of the qualification approach which leaves unqualified persons unrepresented.

The more common situation is for people with out-of-province qualifications to work in Alberta while they delay over getting an Alberta ticket. Also, the Board frequently sees employees trained in one craft performing duties attached to a related craft. This latter practice is particularly prevalent with employers who encourage multi-skilled or composite crews, or cross crafting.

The Board wishes to hear the views of affected parties on this topic. In particular, the Board would be interested in hearing whether, and the degree to which the factors noted above, affect the parties in their day-to-day activities.

> ***Proposal: The Board continue its policy of certifying units of employees functioning within a trade jurisdiction and not move to units consisting of persons qualified to work at a particular craft.***

3. Non-Construction Bargaining Units.

Tradespeople work in many jobs that fall outside the Labour Relations Code's definition of the construction industry. The diversity of these work situations, and the employers who employ them, make it undesirable to adopt bargaining unit policies as firm as those in place for the

construction industry. In some areas of non-construction employment, the Board believes relatively firm policies are desirable. In other areas, the Board can only describe the factors that will influence its judgment. The Board must leave the appropriate bargaining unit question for each particular case as a matter of judgment to be decided after examining the circumstances of the particular employer and employees.

The Board's views are set out in reference to the most common types of employment situations.

a) Plants

The Board favours plant type units for manufacturing plants, petrochemical plants, tar sands plants, power plants, mines and similar undertakings. Normally, the unit would be described as:

> *All employees [at the plant] except office, clerical, security and quality control personnel.*

This policy places operating and maintenance personnel in the same bargaining unit. In plant units, the Board's view is that separate maintenance trade units disrupt orderly collective bargaining. Usually, the tradespersons are largely integrated with the operations employees. They share a strong community of interest with the operations group, rather than just with other craft employees.

The Board normally excludes office and clerical employees from such units. However, the Board may include them if the applicant trade union can show majority support within the office and clerical group. This is to avoid the capture of such staff into a unit by the (usually much larger) industrial work force. However, this may not apply to power plants etc., or in the hospital or municipal sectors.

b) Maintenance Contractors

Alberta industry relies heavily on the services of maintenance contractors. These contractors supply labour and expertise to maintain and repair industrial plants. They may perform ongoing maintenance work at a plant, major maintenance work during a periodic shutdown, or both.

Frequently, contractors who are signatory to the General Presidents' Agreement carry out these contracts. When this is so, the employers have usually structured their operations to coincide with the various trade union hiring halls, relying, in their activities, on the traditional craft lines of the building trade unions.

In such circumstances, the Board has granted, and thinks it sensible to continue to grant, craft-based maintenance certificates.

Even when contractors operating outside the General Presidents' Agreement provide similar maintenance services, the Board usually finds craft-based certificates, rather than all-employee units, appropriate for collective bargaining. This is because it is usual industry practice for the plant owners to requisition employees on the basis of craft designations. This tends to be true whether or not the employer uses the union hiring hall. The pool of employees from whom these workers are taken overlaps the pool of regular construction employees. Often, the type of work performed requires trade qualifications to comply with the Manpower Development Act.

This policy applies to maintenance contractors, not all maintenance work performed by any contractor. Many service and repair contractors perform maintenance work but are not in any way analogous to the contractors whose specific business is engaging in long-term or turn-around industrial plant maintenance. It is to this latter type of employer only that this policy applies.

c) Labour Brokers

The use of labour brokers varies widely within the industry. In assessing an application for certification the Board would examine the way in which the broker's clients usually requisition and deploy employees.

In some cases labour brokers describe their employees in other than the traditional trade terms. Sometimes they classify employees by level rather than craft. The Board's policy is to consider employees by actual job function rather than just by employer designation.

Usually the Board will apply the same appropriateness considerations that would be used for the type of work the employees are supplied to perform. However, the types of broker arrangements are so diverse that the Board cannot express any policy in the non-construction area. The bargaining units for construction would apply equally to labour brokers where they are the true employers.

d) Construction Fabricating Shops

In the past, there has been discussion about whether or not certain types of fabricating shop fall within the statutory definition of construction. The Board decided the question in *U.A. Local 496 v. Stearns-Roger Limited* (1982) 82-012 (McBain Q.C. Chairman).

In that case, the Board distinguished between construction fabricating shops and commercial fabricating shops. Those distinctions remain important today.

The Board described four types of fabricating shop.

1. An on-site shop set-up, by a construction contractor or subcontractor engaged in building the project, to build modules for incorporation into the project.
2. A shop set up off-site, by a construction contractor or subcontractor engaged in building the project, to build modules for transportation to the site for incorporation into the project.
3. A shop set up off-site, by an employer other than the contractor or subcontractors engaged in building the project, to build modules for the owner, contractor, or subcontractor, for transportation to the site and incorporation into the project.
4. A permanent shop that, as part of its business manufactures modules for incorporation into construction projects. This shop usually has a number of customers, probably manufactures certain "catalogue items", and has a permanent location and work force. It may be producing construction modules for different projects at one time, or in sequence.

The Board found the first three types of shop to be a part of the construction industry. Therefore, any relevant registration collective agreements applied to them. The Board's bargaining unit policy for construction employees would also apply. In the next section, when the we refer to Commercial Fabricating Shops, we mean the last type of shop described above, not the first three.

e) Commercial Fabricating Shops, Service, Repair and Specialty Trade Contractors

These categories cover a wide variety of employers all employing tradespersons. However, in each case the challenge is the same. The employees often express a strong preference for representation by their craft union. However, a proliferation of craft units within the employer's operations can cause disputes about work assignments, an onerous series of negotiations and perhaps serial strikes or lockouts as each trade, in turn, bargains with the employer. The challenge for the Board is to find an appropriate balance between the representational wishes of the employees and the legitimate interests of the employer.

The circumstances of employers vary. Many employers, who act as construction subcontractors within a specialty trade, employ a construction work force and so are accustomed to bargaining exclusively on craft lines. These employers often use the same, or a similar, group of employees

to do service or repair work. For these employers one or more craft units are often convenient and appropriate.

Other employers will employ one or two dominant trades in their operations but also employ several helpers, drivers and like persons to work in the operation. While the craft employees may prefer straight craft-based representation, this leaves the helpers etc. without representation. This, in turn, may lead to disputes about who should do a particular piece of work.

An example might be a manufacturer of specialty refrigeration products employing delivery persons, sheet metal workers and refrigeration mechanics. In such cases, the Board would consider granting two bargaining units, one (usually the largest) a craft unit, and the other a "wrap-around" or "tag-end" unit consisting of all the remaining employees including the second craft.

Yet other employers are very close to manufacturing operations where the employees, while including tradespersons, are largely integrated into one production work force. In such cases, the community of interest of employees would favour an all-employee unit rather than separate trade representation.

It is in this broad area that the Board is unable to set out any firm policy capable of automatic application in any given case. The Board must determine each application on its own merits. In doing so, the Board considers the positions taken by the parties, the size and structure of the work force, and the bargaining and representation history.

Notwithstanding this, the Board can give the following guidelines about what it might find appropriate in such circumstances:

1. In situations where the employer's work force involves only employees affiliated with a particular craft, the Board would grant a craft non-construction unit. This situation would often arise for a subcontractor who did both construction work and service and repair work within the same trade.
2. In situations where the employer had an integrated work force where tradespersons from several crafts worked along-side production employees, in a plant or manufacturing type situation, the Board would normally only grant an all employee unit for that employer.
3. In situations where the employer operates a shop with employees from more than one craft, and possibly non-craft employees, the Board would consider applications for either:

    a. an all-employee unit except office and clerical, construction, security and quality control,
    b. a craft unit excluding construction, or
    c. an all-employee unit except office and clerical, construction, security, quality control and a specified craft (a "wrap-around" or "tag-end" unit).

    In deciding whether one of these units was appropriate, the Board would consider the size and structure of the employer's work force. It would also consider any prior bargaining history, certifications and agreements, as well as the wishes of the employees in the crafts represented within the work force.

    Before granting either (b) or (c) above, the Board would want to be satisfied there was little likelihood of jurisdictional problems between the two trades, either because of the nature of the work, or the existence of some firm dispute-resolving agreement between the two unions. The Board would have to be satisfied that the proposed unit was a viable one in terms of the size and continuity of that trade's work force. Lastly, the Board would need to be satisfied that the interests of the employees in having two bargaining agents within the enterprise were not outweighed by other relevant considerations.

4. Where the employer has clerical employees the Board would always exclude them from a

straight craft unit. The Board would normally exclude them from an all employee or a "tag-end" unit, unless the Board was satisfied the clerical employees wanted inclusion. This is to prevent their being swept in as a result of the superior numbers of the blue-collar employees.

5. Where the employees work in a shop, the Board might limit the certificate to employees working "in or out of the shop". If the same employer was also a maintenance contractor, this would distinguish the shop, service and repair employees from those engaged in the maintenance contracting aspect of the business. Again, this refers to a maintenance contracting business, not all maintenance work, some of which falls into what we are calling service and repair work performed by persons working in or out of the shop.

4. Scope of Certificates and Trade Union Constitutional Capacity

Several issues arise that relate to the territorial scope of certificates and trade union constitutional capacity. These considerations are "other matters" not specifically set out as issues into which the Board must inquire. If the Board has authority to grant or deny certificates in several of these circumstances, it must be on one of two grounds. It must be because the resultant bargaining unit is inappropriate or because, exercising its judgment, the Board thinks certification in that circumstance unadvisable. This latter authority can only come from section 37 of the Labour Relations Code, which reads:

> *37 When the Board is satisfied with respect to the matters referred to in section 32(1) and satisfied, after considering any other relevant matter, that the trade union should be certified, the Board shall grant a certificate to the applicant trade union naming the employer and describing the unit in respect of which the trade union is certified as bargaining agent.*

In several of the cases referred to below, the question arises whether the Board can, and then should, follow a possible policy using this residual power in section 37.

a) Territorial Scope - Construction Certificates

Information Bulletin #11 sets out the Board's policy on the territorial scope of construction certificates. This policy applies only to true construction bargaining units.

> Each construction certification is limited to the territorial jurisdiction of the applicant trade union. This limitation is presumed in each certificate without being spelled out in the bargaining unit description. This is true even though registration bargaining is province-wide. The Board may vary this policy in the event of a joint application by two or more trade unions.

The rationale behind this policy was primarily that the Labour Relations Act registration system set up a scheme of bargaining centred around the trade union local. However, there was a secondary aspect to the policy. The hiring hall system, and the union shop provisions that are customary in unionized construction, link the employer's supply of labour directly to the trade union local. This meant that an employer's operations within the trade union local's territory would be related to that local trade union.

The Labour Relations Code registration scheme now mandates province-wide registration bargaining. However, it does not eliminate the significance of locals or change the reality that the local's hiring hall services employers within that local's territory.

Section 174(2) of the Code clearly contemplates that, within the province-wide registration scheme, employers are only bound to the extent of voluntary recognition or certification for a particular local. Thus a contractor with operations in Edmonton and Calgary may be certified in one City and not in the other. As a result, the registration agreement may bind the employer for one half of the Province but not for the other.

Virtually all the current certificates are based on the trade union's territorial jurisdiction. There is no equitable way to change this through the replacement certificate process, even if such change were desirable.

> ***Proposal: Construction bargaining units should continue to be implicitly limited to the trade union local's territorial jurisdiction unless the certificate expressly states otherwise.***

b) Territorial Scope - Non-Construction Certificates

The presumption, for non-construction certificates, is that the certificate covers all the employees of the employer within the Province unless the certificate says otherwise.

The Board will often grant a bargaining unit limited to a particular plant, shop, area or region. However, the Board only does this after looking at the employer's operations to see whether such a limitation is appropriate in the circumstances.

Some employers deliberately structure their operations in a way that matches the trade union's operations, usually by drawing employees from the Union's hiring hall. In such cases, the Board may accept the trade union's territorial jurisdiction as an appropriate limitation on the scope of the certificate. However, where there is no such limit to the employer's operation, and the employer operates regularly throughout the Province, the Board will include the employees of that employer wherever they work. An example might be a road repair contractor who works throughout the province with a mobile crew.

In the past, the Board has issued certificates with implicitly limited scope. Sometimes this was done by a geographical reference after the employer's name. As part of the replacement process, and in new certificates, the Board intends to put such limitations expressly in the unit description. When it is necessary to limit a unit description to the area of a trade union's territorial jurisdiction, the Board may adopt a zone number system to avoid repetition of long geographical descriptions.

It may be desirable (as in construction) to imply a limit based on the trade union's territory for some types of non-construction certificates. Maintenance craft certificates are the most obvious example. The Board would appreciate submissions on this question.

In the non-construction area, trade unions (or more likely locals of one trade union) with less than Province-wide jurisdiction can jointly apply to the Board with those other trade unions whose territory extends to the other areas where the employer has employees. The question of whether this applies in true construction is considered below.

c) Joint Applications - Two or more Trade Jurisdictions.

The Labour Relations Code allows two or more trade unions to jointly apply for certification. The specific section reads:

> *34(1) Two or more trade unions that together claim to have been selected by at least 40% of the employees in a unit that the trade unions consider appropriate for collective bargaining may join in an application for certification as a bargaining agent.*
>
> *(2) When 2 or more trade unions join in an application in accordance with subsection (1), this Division applies to the trade unions in respect of the joint application and to all matters arising from the joint application as if the application had been made by one trade union.*

The question arises whether two building trade unions can apply jointly for a bargaining unit that

combines their two crafts into one unit. We will consider this first in the context of construction units and then in the context of non-construction units.

In construction, the Board views units other than those listed above in Part 2 of this paper as almost invariably inappropriate. The Board believes this to be the case no matter who the applicant, whether a craft or industrial union, or two craft or industrial unions applying jointly. The fact of a joint application by two crafts, Millwrights and Boilermakers for example, would not persuade the Board to grant a "General Construction Millwrights and Boilermakers" unit.

Outside of true construction, the Board's view is basically the same. Generally, the identity of the applicant union, or of joint applicants, does not affect the Board's view of what is appropriate as a bargaining unit. However, as we said in Part 3, a factor the Board would weigh, in a request for more than one unit in shop-type employment situations, is the chance of jurisdictional or work assignment disputes between two crafts.

This means the Board might well grant a unit to two joint applicants that it would not grant to a single applicant trade union if the fact of the joint application provided evidence that the two trades could work together in administering one collective agreement. A joint application could accommodate, in the process, the wishes of the craft employees for craft union representation. In this circumstance, the Board might view a joint application between two trades as a preferable solution rather than two applications, one for a craft unit and another for a "wrap-around" or "tag-end" unit consisting of all the other employees.

The Board questions whether, under section 37 it can, or should, add any preconditions to a joint application. Joint applications raise issues about which union administers the collective agreement for which employee. It raises concerns over contract administration and the duty of fair representation. A possibility is for the Board to require some form of joint administration agreement before granting a certificate to joint applicants. The Board seeks industry comment before setting out a proposal on this topic.

d) Joint Applications - Territorial Scope

The Board's policy is that the unit description for a construction craft unit is implicitly limited to the trade union's territorial jurisdiction. In a number of trades, the trade union jurisdiction is province-wide. However, in other cases the particular craft union may have two or more locals which, together, cover the Province.

The Labour Relations Code Registration scheme combines these locals into an entity called a "group of trade unions" for the purposes of registration bargaining.

The question arises, can two or more such locals combine, in an application under s. 34, for a unit description that covers the whole Province? If they can, when can this be done? The present Information Bulletin 11 implies that the Board may grant such an application. It says: "The Board may vary this rule in the event of a joint application by two or more trade unions."

The scope of any particular construction certificate depends more on the constitutional makeup of the parent trade union than on any policy of the Board. Operating Engineer certificates are province-wide, not because the Board believes this to be the sensible territory, but because the Operating Engineers are structured as one province-wide local.

The Board questions whether it has the ability to prevent two sister locals from applying for one province-wide certificate, even if there was a policy reason for so doing. While section 37 may allow such a policy, the specific wording of section 34 may prevent it. The Board no longer has any explicit responsibility to assess the proper bargaining agent status of trade union applicants.

However, despite this concern, there remains an important question best illustrated by example. Assume two locals for one craft union exist in the province, one covering the north, the other the south. They apply jointly for a certificate that is province-wide. The application must be

supported by 40% of the employees in the proposed unit. Four possibilities exist.

a. Each local has 40% support of the employees in its own territory.
b. The two locals have combined support of 40% in the two territories, but one has more than 40% in its territory, while the other has some, but less than 40%, support.
c. The employees, by a petition signed by over 40%, have selected both locals as their bargaining agent.
d. Only one of the locals has employees in its territory and has 40% support within that group, the other local has none.

Should the Board grant the requested certification on any one of these bases? Looked at another way, we can ask, does the Board have the power to refuse the joint application in (b) or (d), and if so, on what grounds? To decide this question, the Board would have to assess the meaning in section 34 of the words "together claim to have been selected..." The Board would also have to decide whether it can use any overriding discretion in s. 37 to justify any policy restricting joint applicants in light of section 34.

While these issues are important, the Board does not see the question as one of an appropriate unit. Bargaining in most trades is, by operation of registration, province-wide. It is therefore difficult to characterize the proposed unit as inappropriate. However, the questions posed above as to whether situations (a) (b) (c) or (d) give rise to an entitlement to be certified will no doubt arise for decision.

A policy discussion paper of this nature is an inappropriate place for that decision. The Board is interested in the parties' submissions on those questions. However, the Board will probably leave any decision to a Board ruling in an appropriate case.

e) Trade Union Constitutional Capacity

In the past, the Board had a policy restricting which trade unions could apply for certification for particular craft units. Information Bulletin 11-82 set out this policy, and its rationale:

> For a registration certificate to affect an employer the trade union named in the registration certificate must have established the right of collective bargaining with the employer in the trade jurisdiction and territory set out in the registration certificate. If the Board were to certify another building trade union other than the carpenter's union for a carpenter's unit then the registration for carpenters would have no effect on the employer. If this Board were to grant certification as a result of a joint application for certification by two or more trade unions in this industry again the provisions of the Act respecting registration would not apply as the trade union named in the applicable registration would not be the same as the trade union (the two or more trade unions) that established the right of collective bargaining through certification of the employer.
>
> Accordingly, in order to preserve the stability achieved the Board will only issue certifications in the construction industry for the standard bargaining units and will only grant such units to a trade union that normally represents that particular trade. In other words, the Board will not certify a carpenter's union for a unit other than one of their standard units.

The Board adopted this policy in the days when it had the authority and duty to inquire whether a trade union applicant was a proper trade union to make the application. This authorized the Board to assess the Union's constitutional suitability to represent the unit in question.

That authority has long since left our labour legislation. All that remains is the reference to "any other relevant matter" in section 37. The Labour Relations Code simply requires the Board to be satisfied the applicant is a trade union. Should we use section 37 to decline certification on the

basis that the applicant union normally represents a different craft?

A related question is whether the Board has the authority to inquire into whether a trade union's constitution lets it accept into membership all persons within the unit applied for. Again, the only authority, or indication of legislative intention within the Labour Relations Code, is in section 37.

We note that trade unions can now apply without any membership support at all through use of the petition. Employees may not wish such representation, but the Code appears to leave that choice to the employees. They exercise this choice through their choosing to sign a petition, through the mandatory representation vote, or through the periodic option to seek revocation.

It is possible that certifying different unions for construction craft units will affect registration. However, the Board has the power to reconsider and modify registration certificates and include additional trade unions within the various "groups of trade unions". The Board believes the likelihood of any substantial cross-craft organizing is low.

The Board favours a policy that leaves it to the affected employees to decide which trade union they wish to represent them. We see little justification for allowing, on the one hand, an industrial union to represent employees, and on the other hand, denying that option to a different craft union. We believe employees are best able to exercise that choice and there is insufficient need for Board protection to justify overruling the choice made by, initially at least, 40% of the employees involved. The choice is ultimately subject to the approval of the majority through the representation vote and the periodic option to decertify.

> ***Proposal: The Board should not restrict applications for certification for craft employees either to the particular craft that has the constitutional jurisdiction to represent those employees or the craft unions named in the existing registration certificate.***

5. Replacement Certificate Issues

The Board has to issue replacement certificates for all those certificates previously in existence. Section 205 of the Code sets out this obligation and reads in part:

> *205(4) On the coming into force of this section, the Board shall issue a certificate to replace each certificate subsisting under the Labour Relations Act.*
>
> *(5) In issuing replacement certificates under subsection (4) the Board may amend the bargaining unit descriptions contained in the original certificate in order to*
>
> > *(a) clarify the geographic scope of the unit description where that scope is referred to in the certificate but not in the unit description,*
> >
> > *(b) delete words excluding persons who are in any event excluded by the operation of this Act, or*
> >
> > *(c) give consistency to the wording of bargaining unit descriptions without altering the substantive description of the unit.*
>
> *(6) In issuing replacement certificates under subsection (3), the Board may, with the consent of the parties, amend the name of the trade union or the employer to reflect the current names of the parties where, in the opinion of the Board, it is appropriate to do so.*
>
> *(7) Notwithstanding subsection (4), the Board is not required to issue a replacement certificate where it has reason to believe that the employer or the*

trade union has ceased to exist or has not been in business for a substantial period of time.

(8) Where the Board does not issue replacement certificates for the reasons specified in subsection (7), the certificate under the Labour Relations Act shall be deemed to be revoked.

(9) Notwithstanding subsection (8), any party to a certificate that is deemed to be revoked under that subsection may apply for the issuance of a replacement certificate at any time within 90 days from the date he learns of the decision not to issue a replacement certificate, and on receipt of that application, the Board may inquire into the matter and, if in the opinion of the Board it is appropriate to do so, issue a replacement certificate.

The Construction Industry Transition Regulation adds some additional powers in section 8(1), which reads:

8(1) Where a certificate granted under the Labour Relations Act applies to construction and non-construction employees, or encompasses within its scope more than one appropriate bargaining unit, the Board, when issuing replacement certificates pursuant to section 205(4) of the Code, may issue one or more certificates, each representing an appropriate bargaining unit, which cumulatively have the same scope as the certificate granted under the Labour Relations Act.

(2) The powers of the Board in subsection (1) are in addition to those contained in section 205(5) of the Code.

Information Bulletin T-2 discusses the Board's general process for carrying out this task.

The results of this bargaining unit review process will guide the Board in carrying out its responsibility to issue replacement certificates. We will now set out how we currently propose to deal with replacement certificates for construction and quasi-construction employees. We will cover the main types of outstanding unit descriptions. Inevitably there will be anomalies that we will deal with on a case-by-case basis.

a) Unit descriptions based on extended craft jurisdictional claims.

Many early unit descriptions consist of an extended claim to jurisdiction for a particular craft. There are often many variants within the same craft, however, all usually define the work done by the particular craft. Nothing turns on the particular historical anomalies. Where the craft is one for which the Board intends to adopt a standard unit description, the Board will convert the unit description to the new description for that craft.

b) Unit descriptions that include construction and non-construction work for a particular craft.

The Board proposes to split all such certificates into construction and non-construction certificates. Rather than define whether the non-construction is maintenance, shop etc, the Board proposes wording the certificate as simply non-construction. For example:

"*All millwrights*" will become:

"*General Construction Millwrights*" and
"*Non-construction Millwrights*"

The Board recognizes that, in the past, some employers, certified for all employees in a craft,

may have in fact only employed construction employees. The Board believes Regulation 8(1) requires two certificates. However, the employer in this situation may be in a position, if it wished, to apply to revoke the non-construction portion of its certificate. The bases on which it could do so are set out in section 50 of the Labour Relations Code.

The Board also recognizes that, for some employers, a maintenance and a shop certificate might be more appropriate. If this fits the true bargaining situation, the board would exercise its discretion under Section 43 of the Code and modify the non-construction replacement certificate.

c) Unit descriptions referring to field work or field employees.

The Board views the old "field employee" or "field work" designation as the equivalent to the present construction designation. It would therefore issue only a construction certificate for field employees, and a non-construction certificate where the unit description excluded field employees.

d) Unit descriptions limited to one sector.

The Board will replace current certificates limited to a sector with one limited to that same sector.

e) Trades that only operate in one sector.

For those trades that only operate in the general construction sector, the Board will issue the construction certificate limited to the general construction sector.

f) Trades that operate in two or more sectors.

For those trades that operate in two or more sectors, the Board, during the replacement certificate process, will try to find out if the employer has operated in only one sector. If the employer and union agree that the employer has only operated in the one sector, the Board will issue the replacement construction certificate for that sector alone.

If the parties disagree, the Board may conduct such investigation or inquiry as is necessary to determine the matter. Alternately, the Board may issue a construction replacement certificate for each sector in which the employer may have operated with that craft. The Board would then leave it to the employer to apply to revoke any certificate where it was eligible to do so under section 50.

The Board expects in most cases this issue will be relatively clear. In cases of ambiguity, issuing the certificates will result in the matter coming forward as an application for revocation, with a hearing if necessary.

g) Certificates that cover two or more trade jurisdictions.

If the Board adopts the policies set out above, it will have to split up some certificates. For example, Bricklayer certificates may become Masonry Bricklayer, Refractory Bricklayer or both. Similarly, Ironworker certificates may become Structural Ironworker, Reinforcing Ironworker, or both. The Board would consult the parties and try to determine which certificate is appropriate to the employer's operation. If a dispute cannot be resolved by a summary board determination, the Board may issue both certificates and leave it to the employer to apply for revocation if appropriate.

h) Certificates that cover all construction employees.

There are very few "all-employee" certificates that cover construction. The Board doubts that there are any left for employers that still exist. If there are, the Board will deal with them on a

case-by-case basis.

i) Certificates that cover less than a current trade jurisdiction.

With the recommendation to combine, for example, Lathers and Interior Systems Mechanics, the Board must decide how to issue replacement certificates. The merger of the crafts is, in part, a recognition that the same employees are, in essence, doing the same type of work. Therefore, it seems appropriate to issue the new joint craft certificate to replace either of the former individual craft certificates.

j) Shop Certificates

The Board proposes to replace shop certificates with equivalent certificates. Usually the Board will express the shop unit to consist of employees "operating in or out of" the specified shop. The Board will assess the various inclusions and exclusions on a case-by-case basis.

k) Maintenance Certificates

Where certificates cover maintenance employees for a particular trade, the Board will replace that certificate with a similar maintenance certificate. The Board will deal with maintenance certificates that cover "all maintenance employees", or employees in more than one trade jurisdiction, on a case-by-case basis.

l) Managerial Exclusions.

The Code automatically excludes persons employed in a managerial capacity. It also automatically excludes persons employed in a confidential capacity in matters related to labour relations. Replacement certificates will not include limitations clearly designed only to achieve that same purpose. For example, a certificate reading "All employees excluding those employed in a managerial capacity or a confidential capacity in relation to labour relations" will be replaced by one reading "All employees". The persons covered would remain unchanged.

Homepage